No. 86-6139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law submits this brief as *amicus curiae*, urging reversal.[1]

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous individuals in administrative proceedings and lawsuits under

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[1] Pursuant to Rule 36.2, the Lawyers' Committee has filed written consents of the parties to the submission of this brief as *amicus curiae*.

Title VII. *E.g.*, *Lewis* v. *Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *E.g.*, *Chandler* v. *Roudebush*, 425 U.S. 840 (1976); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977).

The question presented by this case—whether disparate impact analysis may be applied to employment practices involving subjective decisionmaking—is an important and recurring issue of Title VII law. This Court's decision will undoubtedly have significant implications for present and future Title VII suits in which the Lawyers' Committee participates. In addition, the Lawyers' Committee's experience in Title VII litigation may enable it to illuminate some of the issues presented by this case for this Court.

SUMMARY OF ARGUMENT

The issue before this Court is a narrow one: whether the court of appeals was correct to preclude disparate impact analysis of the respondent bank's promotion practices on the grounds that such practices were "discretionary," *i.e.*, involving subjective decisionmaking. Contrary to the position of *amicus* United States, this issue is not controlled by this Court's prior decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Teamsters* v. *United States*, 431 U.S. 324 (1977), *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977), and *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). While this Court declined to apply disparate impact analysis in each of those cases, it did so either because the only claims at issue were of intentional discrimination or because the evidence presented did not support a disparate impact claim. Thus, this case presents an issue not yet considered by this Court.

On the merits, the language of Title VII and the case law thereunder, the administrative regulations, and the legislative history of the 1972 amendments all demonstrate that no exemption from disparate impact analysis for subjective employment practices is warranted. Furthermore, the differences between a disparate treatment and disparate impact challenge to a subjective employment practice—which we explain in detail—show that to confine such challenges to disparate treatment analysis would defeat a central purpose of Title VII, *i.e.*, to get rid of employment practices with an adverse impact on suspect groups that are not justified as "job-related" or by "business necessity", whatever the motivation behind the practices. Finally, contrary to the contention of *amicus* United States, allowing disparate impact challenges to subjective practices will not leave an employer without a defense to a disparate impact showing. A "business necessity" or "job-related" defense would still be possible, and certain subjective practices may be capable of validation.

ARGUMENT

I. The Issue Presented by This Case Is Not Controlled by the Prior Opinions of This Court in *McDonnell Douglas*, *Teamsters*, *Hazelwood*, or *Furnco*.

The evidence below established that respondent bank's practice was to allow promotion decisions to rest in the discretion of "a limited group of white department supervisors." Pet. App. 7a. The court of appeals held that the petitioner could not attempt to show that such a promotion policy was unlawfully discriminatory under disparate impact analysis because the promotion policy was "discretionary." Pet. App. 8a. In *Connecticut* v. *Teal*, 457 U.S. 440, 445-446, 448 (1982), this Court noted that disparate impact analysis, first outlined in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), is based on

Section 703(a)(2) of Title VII,[2] and that *Griggs* and its progeny stand for the proposition that an employment practice which has a disparate impact on a suspect group and is not shown to be related to job performance is illegal, whether or not the employer had an "invidious intent" in adopting such a practice. *Id.* at 446. Disparate treatment analysis, by contrast, seeks to outlaw intentional discrimination in employment, on either an individual or class-wide basis. *Teamsters* v. *United States*, 431 U.S. 324, 335-36 & n.15 (1977). This Court has emphasized that a given employment practice may be attacked under both disparate impact and disparate treatment theories. *Id.* at 336 n.15. Thus, the issue before this Court is whether the Fifth Circuit correctly precluded the plaintiff from proceeding under disparate impact theory on the grounds that the employment practice she challenged was "discretionary."

In its *amicus* brief on petition for writ of certiorari, the United States suggested that this Court has already decided this issue in four prior decisions, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Teamsters* v. *United States*, 431 U.S. 324 (1977), *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977), and *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). According to the United States, all four cases involved attacks on "subjective selection devices," and, in each case, this Court "declined to extend the disparate

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[2] Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1982), provides in the pertinent part as follows:

> "It shall be an unlawful employment practice for an employer—
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

impact doctrine * * * [and] instead * * * required Title VII plaintiffs to prove discriminatory motivation." Brief for the United States as *Amicus Curiae* in Support of Petition for Writ of Certiorari, at 11 (May 1987) (hereinafter "U.S. Cert. Brief"). Contrary to the United States' position, however, examination of those four cases reveals that none decided the precise issue presented here.

In three of the four cases cited by the United States in its brief on certiorari, *McDonnell Douglas*, *Teamsters*, and *Hazelwood*, the only claims presented were of intentional racial discrimination; no claims of disparate impact under § 703(a)(2) of Title VII were made. Thus, in *McDonnell Douglas*, plaintiff's claim was that the employer defendant "had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703(a)(1) and 704(a) [of Title VII]." 411 U.S. at 796. Similarly, *Teamsters* and *Hazelwood* both involved claims that the employer had engaged in a "pattern or practice" of intentional discrimination. See *Teamsters*, *supra*, 431 U.S. at 335 ("The Government's theory of discrimination was simply that the company, in violation of § 703(a) of Title VII, regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons."); *Hazelwood*, *supra*, 433 U.S. at 307 n.11 (as in *Teamsters*, the government's claim was that the employer " 'regularly and purposefully treated Negroes . . . less favorably than white persons' "). Thus, given that the only claim asserted in each of the three cases was intentional discrimination, each was properly analyzed under disparate treatment theory, and disparate impact analysis was not implicated.

The United States cites language from *McDonnell Douglas* where this Court drew a distinction between the plaintiff's claim of a discriminatory refusal to rehire him, and an exclusion from employment, as in *Griggs*,

"on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior * * *." U.S. Cert. Brief at 12, citing 411 U.S. at 806. But the point of this distinction was not, as the U.S. suggests, to draw a line between "objective" employment practices, to which a *Griggs* analysis applies, and "subjective" practices, to which *Griggs* is inapplicable. Instead, the Court's point was that the *Griggs* disparate impact analysis is designed to challenge "systemic results of employment practices." *Segar* v. *Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984). Thus, because the plaintiff in *McDonnell Douglas* claimed only that he was the victim of an intentionally discriminatory employment decision unique to him, rather than any sort of broader policy or system of the employer, disparate impact analysis did not apply.

In contrast to *McDonnell Douglas*, *Teamsters* and *Hazelwood*, the plaintiffs in *Furnco* sought to proceed under both disparate impact and disparate treatment analysis. 438 U.S. at 569. The case involved the hiring of bricklayers by a superintendent at a construction site. The challenged practice was the superintendent's refusal to accept applications for bricklayer positions at the job site; instead, the superintendent "hired only persons whom he knew to be experienced and competent * * * or persons who had been recommended to him as similarly skilled." 438 U.S. at 570. Although this Court held that the "proper approach" for this claim was the disparate treatment model set forth in *McDonnell Douglas*, 438 U.S. at 575, the reason for this conclusion was not that a "subjective" employment practice was involved. The district court in *Furnco* had held that plaintiffs had not shown that Furnco's policy of not hiring at the gate "had a disproportionate impact or effect on black bricklayers," 438 U.S. at 571, and this finding had not been found to be erroneous by the court of appeals. *Id.* at

570. Thus, when this Court concluded that plaintiffs' claims were properly analyzed under the model set forth in *McDonnell Douglas*, it was simply affirming the district court's and court of appeals' holdings that there was insufficient evidence to make out a disparate impact claim.[3] In these circumstances, this Court did not have to reach the issue presented here, *i.e.*, whether the type of "discretionary" or "subjective" employment practice at issue in *Furnco* could be subject to disparate impact analysis.[4]

In sum, the narrow issue presented by this case—whether disparate impact analysis may be applied to subjective employment practices—has never been decided by this Court. And, as we discuss below, there is no basis for an exception to disparate impact analysis when the employment practice challenged involves subjective decisionmaking.

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[3] *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc) (disparate impact analysis was inapplicable in *Furnco* because plaintiffs "failed to establish a prima facie case of disparate impact"); C. Sullivan, M. Zimmer, R. Richards, *Federal Statutory Law of Employment Discrimination* § 1.6, at 67 (1980) ("better construction" of *Furnco* is that "disparate impact analysis was available but there was no showing of impact").

[4] The United States suggests that, like the plaintiffs in *Furnco*, petitioner's evidence would not make out a prima facie case of disparate impact. See U.S. Cert. Brief at 20 n.16. Nevertheless, petitioner is in a different position before this Court than the plaintiffs in *Furnco*; rather than evaluating her statistical evidence and holding that a prima facie case of disparate impact was not presented, the lower courts in this case simply precluded petitioner from proceeding on a disparate impact basis.

II. Subjective Employment Practices Should Not Be Exempt From Disparate Impact Analysis.

A. The Language of Title VII and Case Law Thereunder, the Administrative Regulations, and the Legislative History of the 1972 Amendments Demonstrate That No Exemption From Disparate Impact Analysis for Subjective Employment Practices Is Warranted.

Examination of the language of Title VII, the relevant case law, the administrative regulations, and the legislative history of the 1972 amendments demonstrates that no exception to disparate impact analysis for employment practices involving subjective decisionmaking is justified.[5]

In *Connecticut* v. *Teal*, *supra*, 457 U.S. at 445-46, 448, this Court held that disparate impact analysis is founded upon Section 703(a)(2) of Title VII. That section prohibits "employment practice[s]" which "limit, segregate, or classify" employees or applicants because of "race, color, religion, sex, or national origin." See p. 4, n.2, *supra*. Thus, as noted in *Teal*, *supra*, 457 U.S. at 448, "[t]he statute speaks * * * in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*." (Emphasis in original.) This language does not suggest an exemption for employment "practices," "limitations," or "classifications" which involve or result from subjective decisionmaking. Further, this Court's decisions have broadly stated that employment "practices" or "procedures" may be subject to disparate impact analysis, without carving out any exception for practices or procedures that involve subjective decisionmaking. *E.g.*, *Griggs*, *supra*, 401 U.S. at 430 (disparate impact analysis reaches employment "practices, procedures, or tests"); *Washington* v. *Davis*,

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[5] For a more detailed analysis of these points, see the brief for *amicus curiae* NAACP Legal Defense and Educational Fund, Inc.

426 U.S. 229, 246-47 (1976) (disparate impact analysis available to challenge "hiring and promotion practices").

The administrative regulations under Title VII also provide support for the point that employment practices involving subjective decisionmaking should not be exempt from disparate impact analysis. Those regulations ("Uniform Guidelines on Employee Selection Procedures") define the selection procedures to which disparate impact analysis may be applied as ranging from the objective "traditional paper and pencil tests" to the clearly subjective "informal or casual interviews and unscored application forms." 29 C.F.R. §§ 1607.3(A), 1607.16(q) (1986). Because these regulations were promulgated by the four federal agencies responsible for enforcing Title VII,[6] this Court has noted that they are entitled to "great deference" as the enforcing agencies' "administrative interpretation of the Act." *Griggs*, *supra*, 401 U.S. at 433-34; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975). See also *Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 2399, 2405 (1986) (while not controlling, EEOC guidelines " 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' ").

The legislative history of the 1972 amendments to Title VII similarly indicates that no exception to disparate impact analysis for employment practices involving subjective decisionmaking is warranted. In *Connecticut* v. *Teal*, *supra*, 457 U.S. at 449, this Court noted that the legislative history to the 1972 amendments showed that Congress intended to remove for state and municipal employees the same sort of "discriminatory barriers" to equal employment opportunity that the

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[6] These agencies are the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice. 29 C.F.R. § 1607.1(A) (1986).

Griggs disparate impact analysis had removed for private sector employees; examples of such "barriers" identified by Congress included "promotions made on the basis of * * * 'discriminatory supervisory ratings.'" *Id.* at 449 n.10. Thus, Congress clearly anticipated that disparate impact theory could be applied to such subjective employment practices. Moreover, the legislative history of the 1972 amendments shows that Congress meant, in areas where a contrary intention was not expressed, to endorse the existing Title VII case law. *Id.* at 447 n.8. And, at the time of the 1972 amendments, courts of appeals had applied disparate impact analysis to employment practices involving subjective decisionmaking. See *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1482-83 (9th Cir. 1987) (en banc) (citing *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 657-58 (2d Cir. 1971)).

In sum, the language of Title VII, the case law, the administrative regulations, and the legislative history of the 1972 amendments all indicate that subjective employment practices should be subject to disparate impact analysis. Moreover, as we show below, creating an exception to disparate impact analysis for subjective employment practices would defeat a central purpose of Title VII.

B. Relegating Plaintiffs Who Challenge Subjective Employment Practices to Disparate Treatment Analysis Would Defeat a Central Purpose of Title VII.

If this Court affirms, plaintiffs challenging subjective employment practices as illegally discriminatory will be confined to disparate treatment analysis. When a plaintiff is challenging one employment decision unique to him, as in *McDonnell Douglas Corp.* v. *Green*, *supra*,[7]

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[7] In *McDonnell Douglas*, the plaintiff challenged the employer's failure to rehire him after his participation in various civil rights

confining that plaintiff to disparate treatment analysis would not make a difference. A case that involves one unique employment decision is not the sort where a disparate impact claim could be made out. But where a plaintiff is challenging a pattern or a series of subjective employment decisions, relegating that plaintiff to disparate treatment analysis would be significant. There are important differences between disparate treatment and disparate impact analysis in that situation. Because of these differences, confining attacks on a pattern or series of subjective employment decisions to disparate treatment analysis would defeat a central purpose of Title VII identified in *Griggs*—to get rid of employment practices with an adverse impact on suspect groups that are not justified by business necessity, whatever the motivation behind the practices.

The aim of disparate treatment analysis is to discover whether there has been intentional discrimination in violation of Title VII. "Proof of discriminatory motive is critical * * *." *Teamsters* v. *United States*, *supra*, 431 U.S. at 335 n.15. Given this ultimate issue, a disparate treatment challenge to a pattern or series of employment practices involving subjective decisionmaking would proceed as follows.[8]

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demonstrations against the employer's allegedly racist hiring policies. The plaintiff did not challenge any broad policy or practice of the employer concerning the rehiring of former employees, just one employment decision affecting him. 411 U.S. at 796.

[8] Disparate treatment challenges to a pattern or series of employment decisions generally proceed as "pattern or practice" actions. In a "pattern or practice" case, the allegation is that the employer "regularly and purposefully" discriminated, *i.e.*, that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters* v. *United States*, *supra*, 431 U.S. at 335-36; *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 876 (1984). While pattern or practice suits are brought either by the EEOC, pursuant to § 707(d)-(e) of Title VII, 42 U.S.C. § 2000e-6(d) to -(e) (1982), or as private class actions,

As an initial matter, a plaintiff making a disparate treatment claim must present a prima facie case of intentional discrimination, *i.e.*, the "plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII]." *Teamsters*, *supra*, 431 U.S. at 358. In *McDonnell Douglas*, *supra*, 411 U.S. at 802, this Court outlined one formulation of how a plaintiff could go about establishing a prima facie case of intentional discrimination.[9] But this Court has stressed that the *McDonnell Douglas* formulation is not the only means by which a plaintiff may establish a disparate treatment claim. *Teamsters*, *supra*, 431 U.S. at 358 (decision in *McDonnell Douglas* "did not purport to create an inflexible formulation"). In a case where the plaintiff's claim is that a pattern or series of employment decisions are discriminatory, plaintiff's proof will often be statistical in nature.

Cooper v. *Federal Reserve Bank*, *supra*, 467 U.S. at 876 n.9, there is no reason why an individual plaintiff could not make out a case according to the "pattern or practice" order of proof, so long as that plaintiff shows that he was personally affected by the discriminatory policy. *E.g.*, *Davis* v. *Califano*, 613 F.2d 957, 962-66 (D.C. Cir. 1979) (individual plaintiff established a prima facie case of discrimination through elements of a pattern or practice claim set forth in *Teamsters*); *Diaz* v. *American Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985) (statistical evidence of a discriminatory pattern in employer's hiring or promotion practices can "create an inference of discriminatory intent" with respect to employment decision at issue in action brought by individual plaintiff).

[9] Under the *McDonnell Douglas* formulation, a plaintiff may establish a prima facie case of intentional discrimination "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

Statistical proof that an employment practice is discriminatory will generally involve a showing of a statistical disparity between the race or sex of the group selected by the practice, and the race or sex of the group available for the job, such as the general work force, the qualified labor market, or actual applicants. *Hazelwood School Dist.* v. *United States*, *supra*, 433 U.S. at 308 (proper comparison in teacher hiring discrimination case was between racial composition of teaching staff and racial composition of "qualified public school teacher population in the relevant labor market"); *Johnson* v. *Transportation Agency*, 107 S. Ct. 1442, 1452 n.10 (1987) (to make out a prima facie case of hiring discrimination among skilled workers in Kaiser work force, plaintiff "would be required to compare the percentage of black skilled workers in the Kaiser work force with the percentage of black skilled craft workers in the area labor market"). Statistical evidence of such a disparity is "probative" in a case alleging systemic discrimination "because such imbalance is often a telltale sign of purposeful discrimination." *Teamsters*, *supra*, 431 U.S. at 340 n.20. As this Court has noted, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Id.*

Although this Court has never defined exactly what degree of disparity must be shown to make out a prima facie case of intentional discrimination, it noted, in *Hazelwood School Dist.* v. *United States*, *supra*, that if the difference between the expected and observed number of blacks on the Hazelwood teaching staff were greater than two or three standard deviations, "then the hypothesis that teachers were hired without regard to race would be suspect." 433 U.S. at 309 n.14, citing *Castaneda* v. *Partida*, 430 U.S. 482, 496-97 & n.17 (1977). This makes

sense, since two standard deviations corresponds to statistical significance at the .05 level, which means in turn that "there exists at most a one in 20 possibility that the observed result could have occurred by chance." *Segar* v. *Smith*, *supra*, 738 F.2d at 1282-83 & n.28. *Hazelwood* stands for the point, therefore, that when a plaintiff has shown a disparity equal to two standard deviations or of statistical significance at the .05 level—and thus that there is only one chance in twenty that the disparity could be explained by chance—the plaintiff's evidence is normally sufficient to make out a case of intentional discrimination. See *Segar* v. *Smith*, *supra*, 738 F.2d at 1282-83 (several courts and the Department of Justice have taken the position that a disparity between the group available for a job and the group selected which is statistically significant at the .05 level is sufficient to support an inference of intentional discrimination); B. Schlei & P. Grossman, *Employment Discrimination Law* 1372 (1983) (same). See generally D. Baldus & J. Cole, *Statistical Proof of Discrimination* §§ 9.0-9.42 (1980 & Supp. 1986).

A plaintiff is not, of course, confined in a disparate treatment action to statistical evidence, and often the plaintiff's statistical case will be buttressed by other evidence supporting the claim of intentional discrimination. Examples of such other evidence include anecdotal evidence of discrimination, *Teamsters*, *supra*, 431 U.S. at 339; *Hazelwood*, *supra*, 433 U.S. at 303; a history of discrimination by the employer and ineffectual attempts by the employer to eradicate such discrimination, *Bazemore* v. *Friday*, 106 S. Ct. 3000, 3009 (1986); *Hazelwood*, *supra*, 433 U.S. at 303, 309 n.15; or "standardless and largely subjective [employment] procedures." *Hazelwood*, *supra*, 433 U.S. at 303.[10] There is no prescribed

[10] Courts have repeatedly recognized that evidence of subjective employment practices can buttress statistical evidence of disparate treatment. *E.g.*, *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864, 867

formula concerning when such nonstatistical evidence is needed to make out a case of disparate treatment; the question in each case is simply whether the sum of evidence presented by the plaintiff is sufficient to support the inference of intentional discrimination. *Bazemore* v. *Friday*, *supra*, 106 S. Ct. at 3009. See *Segar* v. *Smith*, *supra*, 738 F.2d at 1278 ("neither the presence nor the absence of specific anecdotal accounts alters the standard that a plaintiff's initial case must meet;" issue is whether plaintiff's "cumulative" evidence is "sufficient to support an inference of discrimination").

Once the plaintiff has made out a prima facie case of disparate treatment, whether by statistical evidence alone or by a combination of statistical and nonstatistical evidence, a burden of rebuttal shifts to the employer; this follows from the fact that if the employer is silent and the trier of fact believes the plaintiff's evidence, the plaintiff must prevail.

The sort of rebuttal evidence an employer will offer to a strong statistical and nonstatistical showing of intentional discrimination will typically include an attempt to discredit the nonstatistical evidence and to refute plaintiff's claim that a statistical disparity exists, by attacking the accuracy of plaintiff's statistics or offering alternative statistical analyses. Alternatively, the employer may offer evidence explaining the disparity shown by plaintiff's statistics, such as by "com[ing] forward with some additional job qualification * * * that the plaintiff class lacks, thus explaining the disparity." *Segar* v.

(9th Cir. 1982), *overruled on other grounds*, *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc) ("subjective decisionmaking strengthens an inference of discrimination from general statistical data"); *Harris* v. *Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) ("Nonobjective evaluation systems may be probative of intentional discrimination, especially when discriminatory patterns result, because such systems operate to conceal actual bias in decisionmaking.")

Smith, supra, 738 F.2d at 1268; *Teamsters, supra*, 431 U.S. at 360 (on rebuttal to a pattern or practice showing, employer will try to demonstrate that the plaintiff's proof "is either inaccurate or insignificant").[11]

Under the *McDonnell Douglas* formulation, an employer may rebut a plaintiff's prima facie case simply by offering, through admissible evidence, a legitimate, nondiscriminatory reason for the plaintiff's non-selection. *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. at 802; *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 (1981).[12] This minimal rebuttal burden is tailored to the minimal evidence a plaintiff must offer to make out a prima facie case of intentional discrimination under *McDonnell Douglas* (see p. 12, note 9, *supra*); given plaintiff's minimal showing, evidence by the defendant of a legitimate, nondiscriminatory reason for plaintiff's non-selection is sufficient to allow a factfinder to decline to draw the inference of intentional discrimination. See *Burdine, supra*, 450 U.S. at 254-55 ("The

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[11] If, in rebuttal to a statistical case of disparate treatment, the employer offers evidence that a specific employment practice, such as an experience requirement, explains the disparity, the case will be transformed into a disparate impact case, and the employer will bear the burden of proving that the employment practice it has identified is justified by business necessity. *Segar* v. *Smith, supra*, 738 F.2d at 1270, 1288; *Latinos Unidos de Chelsea en Accion (Lucha)* v. *Secretary of Housing and Urban Development*, 799 F.2d 774, 787 n.22 (1st Cir. 1986); *Lewis* v. *Bloomsburg Mills*, 773 F.2d 561, 571 n.16 (4th Cir. 1985); *Griffin* v. *Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985); *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 521 F. Supp. 656, 662 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984). See generally, Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 1005-06 (1982).

[12] Because the "legitimate, nondiscriminatory reason" must be presented through "admissible" evidence, neither "[a]n articulation not admitted into evidence," "an answer to the complaint," nor "argument of counsel" will be sufficient. *Texas Dep't of Community Affairs* v. *Burdine, supra*, 450 U.S. at 255 n.9.

explanation provided must be legally sufficient to justify a judgment for the defendant.")

By contrast, when the plaintiff has offered strong statistical evidence or a combination of strong statistical and nonstatistical evidence supporting the inference of intentional discrimination, an employer must do more than articulate a "legitimate, nondiscriminatory" explanation for plaintiff's evidence to adequately rebut the plaintiff's case. This follows from the fact that if plaintiff has presented strong statistical and nonstatistical evidence of intentional discrimination, the mere articulation of a nondiscriminatory explanation for that evidence —without more—will be insufficient to allow a factfinder to find for the employer. Thus, in *Paxton* v. *Union Nat'l Bank*, 688 F.2d 552, 566 (8th Cir. 1982), the court of appeals reversed the district court's finding of no discrimination in promotions, where the plaintiffs presented strong statistical and nonstatistical evidence of intentional discrimination, and the employer's "vague assertion that black employees as a whole within the bank were not as qualified as the white employees," and "ad hoc, contradictory and conflicting explanations" for individual promotion decisions "[did] not even begin to explain the broad pattern of promotional discrimination" shown by plaintiffs. See also *Teamsters*, *supra*, 431 U.S. at 343 n.24 (" 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion' "); *Segar* v. *Smith*, *supra*, 738 F.2d at 1269-70 ("in the class action pattern or practice case[,] the strength of evidence sufficient to meet [the employer's] rebuttal burden will typically need to be much higher than the strength of the evidence sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* showing"); *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 521 F. Supp. 656, 663 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) (same).

Once the defendant has offered rebuttal evidence, the plaintiff may attempt to discredit the rebuttal or may instead rely solely on his or her initial proofs. *Burdine*, *supra*, 450 U.S. at 256; *Segar* v. *Smith*, *supra*, 738 F.2d at 1270 n.15. At that point, the issue for the trier of fact is whether, "in light of all the evidence presented by both the plaintiff and defendant * * * it is more likely than not that impermissible discrimination exists." *Bazemore* v. *Friday*, *supra*, 106 S. Ct. at 3009. If plaintiff's statistical evidence, significant to two or three standard deviations, has not been undermined and defendant has not convincingly (and lawfully) justified the disparity, plaintiff should prevail.[13]

The evidence presented by a plaintiff in a disparate impact challenge to a subjective employment practice will be similar in many respects to that presented in a disparate treatment challenge. The plaintiff will offer evidence of a statistical disparity between the race or sex of the group selected by the practice, and the race or sex of the group available for the job, composed of the gen-

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[13] If a pattern or practice of discrimination is established, and a proceeding moves to the remedy stage, the burden of proof rules are different. As this Court held in *Teamsters*, *supra*, "proof of the pattern or practice [of discrimination] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." Thus, at the remedial stage, plaintiffs "need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." At that point, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." 431 U.S. at 362 (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976)). Moreover, many courts have held that the employer's burden of proof at the remedy stage is by clear and convincing evidence. *E.g.*, *Trout* v. *Lehman*, 702 F.2d 1094, 1107 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984) & cases cited; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 443-44 (5th Cir. 1974).

eral workforce, the qualified labor market, or actual applicants for the job. *E.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977) (height and weight requirements for prison guards have a disparate impact on females where standards would exclude from employment 41.13% of the female population and only 1% of the male population).[14] As in disparate treatment actions, this Court has never defined precisely what magnitude of disparity is required to make out a case of disparate impact. The cases have referred to a showing that a requirement disqualifies a suspect group "at a substantially higher rate" than white applicants, *Griggs*, *supra*, 401 U.S. at 426; or that a given employment practice "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425. It is possible that a disparity less than two standard deviations might suffice. See, *e.g.*, D. Baldus & J. Cole, *supra*, § 9.221 (Supp. 1986).

Because employers frequently have selection procedures which combine many components, both subjective and objective, a plaintiff making a disparate impact challenge must be allowed to make a case—as plaintiffs may in disparate treatment actions—by showing that the selection procedure as a whole has produced a statistical disparity between the group selected under the procedure and the group available for the job. The plaintiff should not also have to identify which specific selection component caused the adverse impact. *E.g.*, *Griffin* v. *Carlin*, 755 F.2d 1516, 1523-25 (11th Cir. 1985). See also *Connecticut* v. *Teal*, *supra*, 457 U.S. at 458 (Powell, J., dissenting) ("our dis-

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[14] Because disparate impact suits necessarily challenge a series of employment decisions, they often proceed as class actions. But individual plaintiffs may also bring disparate impact claims. *E.g.*, *Coe* v. *Yellow Freight System*, 646 F.2d 444, 451 (10th Cir. 1981) (individual may bring a disparate impact claim so long as he satisfies requirement of standing by showing that he was affected by the practices alleged to have disparate impact).

parate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group") (emphasis in original). The data necessary for such an identification is often prohibitively expensive for plaintiffs to obtain and is more readily available to the employer. Moreover, limiting disparate impact analysis to cases in which the plaintiff is able to show that a particular component of a multi-component selection procedure caused adverse impact would completely exempt the situation when two or more components interact together to produce a disparate impact. See *Griffin* v. *Carlin*, *supra*, 755 F.2d at 1516, citing *Gilbert* v. *City of Little Rock*, 722 F.2d 1390, 1397-98 (8th Cir. 1983).

On the employer's side, the rebuttal evidence offered to a disparate impact showing will be similar in many respects to the rebuttal evidence offered in a disparate treatment action. Indeed, since plaintiff will often have presented the two types of analysis in the same case, employers must often deal with both at once. The rebuttal will likely involve an attack on plaintiff's statistics, either directly or by alternative statistical analyses. At this point, however, disparate impact and disparate treatment theories diverge. In a disparate impact case, once the plaintiff has proven that a given employment practice has adverse impact, the burden of proof shifts to the employer to show that the practice is job-related or justified by business necessity. *Griggs*, *supra*, 401 U.S. at 432 (in disparate impact cases, "Congress has placed on the employer the burden of showing that any given requirement [has] a manifest relationship to the employment in question."). Accord, *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329; *Connecticut* v. *Teal*, *supra*, 457 U.S. at 446-47. Thus, while an employer can defend against a disparate treatment challenge by rebutting plaintiff's showing of intentional discrimination, an employer must do more to defeat a showing of adverse im-

pact; the employer must prove that the employment practice is job-related or justified by business necessity.[15]

This critical difference between disparate impact and disparate treatment analysis demonstrates that confining challenges to subjective employment practices to disparate treatment theory would defeat a central purpose of Title VII. In *Griggs*, *supra*, 401 U.S. at 431, this Court held that Title VII was intended to proscribe not only "overt discrimination," "but also practices that are fair in form, but discriminatory in operation." Further, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original). Thus, *Griggs* held, Congress intended in Title VII that employment practices with bad consequences (an adverse impact on a suspect group) must be justified, by business necessity or as job-related, to be lawful. *Id.* at 431. See also *Washington* v. *Davis*, *supra*, 426 U.S. at 248 (under *Griggs*, an employment practice "designed to serve neutral ends is nevertheless invalid, absent compelling jus-

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[15] Even if the employer proves a business necessity defense, the plaintiff may still prevail if he shows "that other tests or selection devices, without a similarly undesirable * * * effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425. Accord, *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329.

As in disparate treatment actions (see p. 18, note 13, *supra*), once an unjustified disparate impact is established and the case moves to the remedy stage, individual plaintiffs need only show that they were affected by the employment policy with adverse impact, and the employer then bears the burden of proving that the plaintiff would have been denied the employment opportunity absent discrimination. *E.g.*, *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 289 (2d Cir. 1981); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978). Again, as in disparate treatment actions, courts have held that the employer's burden of proof at the remedy stage is by clear and convincing evidence. *E.g.*, *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976).

tification, if in practice it benefits or burdens one race more than another"). Confining challenges to subjective employment practices to disparate treatment analysis would, therefore, defeat this central purpose of Title VII. Under disparate treatment analysis, subjective employment practices with an adverse impact on suspect groups would not need to be justified to be lawful, so long as they were not found to be intentionally discriminatory.[16]

C. Allowing Disparate Impact Challenges to Subjective Employment Practices Will Not Leave an Employer Without a Defense to a Disparate Impact Showing.

In its *amicus* brief on petition for certiorari, the United States suggests that an exemption from disparate impact analysis for subjective employment practices is warranted because such practices "may not be susceptible to validation or other such objective substantiation." U.S. Cert. Brief at 15. Thus, the argument goes, to apply disparate impact analysis to employment practices involving subjectivity would leave an employer "with no possible defense" to a disparate impact showing. *Id.* at 19-20.

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[16] It should also be noted that confining challenges to subjective employment practices to disparate treatment analysis would encourage employers to make most of their practices subjective. Courts have recognized that subjective practices can more easily mask discriminatory motivation than objective ones. *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective evaluations involving white supervisors provide a "ready mechanism" for racial discrimination). Accord, *Rowe* v. *Cleveland Pneumatic Co.*, 690 F.2d 88, 93 (6th Cir. 1982); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). See also p. 14, note 10, *supra*. Yet it could not have been the intent of Congress to encourage employers to use subjective devices in place of objective criteria. *Atonio* v. *Wards Cove Packing Co.*, *supra*, 810 F.2d at 1485 ("It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods.") *Griffin* v. *Carlin*, *supra*, 755 F.2d at 1525 (same).

This Court has never held, however, that formal validation is the only defense to a showing that an employment practice has adverse impact. Instead, the cases have spoken of the need for the employer to show that the employment practice has a "manifest" or "demonstrable" relationship to the job in question, *Griggs*, *supra*, 401 U.S. at 431, 432; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425; or that it is "necessary to safe and efficient job performance * * *." *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 332 n.14. See also *Griggs*, *supra*, 401 U.S. at 431 (the "touchstone" of the defense to a disparate impact claim is a showing of "business necessity"); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977) (issue is whether "company's business necessitates the adoption" of employment practice at issue). Moreover, this Court has held that the defense may be made out on evidence other than a formal validation study. *E.g.*, *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 & n.31 (1979) (even if employer's rule excluding all users of narcotics and certain other drugs from employment had an adverse impact, rule would be sustained because employer has shown that rule serves employer's "legitimate employment goals of safety and efficiency"). See generally B. Schlei & P. Grossman, *supra*, at 164 (courts have generally not required that education and other nonscored employment criteria be validated, allowing job-relatedness to be shown by other evidence), citing, *e.g.*, *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) (upholding college degree requirement for airline pilots based on testimony by airline officials); *Castro* v. *Beecher*, 459 F.2d 725, 735 (1st Cir. 1972) (upholding high school diploma requirement for police officers based on Kerner Commission recommendation that all police officers have a high level of education).

Thus, an employer may be able to sustain a subjective employment practice with adverse impact that cannot feasibly be validated if, for example, the employer offers

evidence to show that continued use of the practice is essential to its business, and that it has instituted safeguards to ensure that discretion is focused on job-related variables and that subjectivity is not being used to mask intentional or unintentional discrimination. *E.g.*, *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 450-51 (7th Cir. 1976) (business necessity defense to subjective promotion process not made out where "supervisory recommendations play an important role" in promotions, but foremen, who are all white, "have no objective way of rating the employees," and have no "written guidelines delineating the criteria" for which they are looking); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972) (subjective promotion/transfer procedures fail business necessity test where foremen's recommendations are the "indispensable single most important factor," but foremen receive "no written instructions" on criteria to be applied and hourly employees are not notified of jobs available or qualities necessary for promotion).[17]

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[17] The Uniform Guidelines provide that in circumstances when an employment procedure has adverse impact and an employer "cannot or need not utilize the validation techniques contemplated by these guidelines," the employer should "justify continued use of the procedure in accord with Federal law." 29 C.F.R. § 1607.6 (B)(1) & (2) (1986). Since the only method under "Federal law" to justify an employment procedure with adverse impact is to show that the procedure is job-related or justified by business necessity, the Guidelines clearly anticipate that those defenses may be made out in some circumstances without formal validation. This interpretation of the Guidelines is confirmed in the EEOC's questions and answers designed to clarify the Guidelines. 44 Fed. Reg. 11996 (March 2, 1979). There, in response to a question concerning whether a selection procedure could be justified without validation, the EEOC stated that, under *Griggs*, a "selection procedure could be used if there was a business necessity for its continued use," and that "therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business * * *." *Id.* at 12002.

Furthermore, there is no apparent reason why certain subjective criteria cannot be validated in the same manner as objective criteria. As Professor Bartholet points out:

> "The validity of a written test is traditionally established by correlating the scores of candidates who passed the test and are on the job with indicia of their job performance. A subjective assessment process, like a written test, can be scored even if only for the purpose of conducting a validity study. Alternatively, an employer can establish the validity of subjective processes by proving that the behavior assessed by the process represents a fair sample of the behavior required in the job at issue, or that the subjective process measures the knowledge, skills or abilities that are the necessary prerequisites to the job.
>
> "The industrial psychology literature * * * contains numerous descriptions of validity studies of the most commonly used subjective processes, such as interviews, the evaluation of biographical data, and assessment center techniques." (Citations omitted.)

Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 987-88 (1982). It may be that validation techniques developed for certain objective employment practices, such as scored tests, will have to be modified, or new validation techniques developed for subjective practices such as interviews. *Id.* at 989, 985 n.133. But these issues are not before the Court at this time. The fact that validation of some subjective employment practices may, in certain cases, be difficult or call for new validation techniques, does not justify the creation by this Court of an across-the-board exemption from disparate impact analysis for all employment practices involving subjective decisionmaking.

CONCLUSION

If an employer need make no business-related defense of his subjective or discretionary employment practices, such practices may have a substantially adverse impact on suspect groups for no good reason whatsoever. Title VII should not be construed to permit such a result, and thus the disparate impact analysis of *Griggs* should not be restricted in ways that undercut a central purpose of Title VII. For the reasons stated above and in the Brief for the Petitioner, *amicus* Lawyers' Committee urges the Court to reverse the decision below.

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